Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

ANN MARK,

Petitioner,

v.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, NEW YORK STATE RETIREMENT FUND and NEW YORK CITY PENSION FUNDS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KENNETH A. ELAN
LAW OFFICES OF KENNETH A. ELAN
217 Broadway - Suite 606
New York, NY 10007
(212) 619-0261

JOSEPH P. GARLAND
KLEIN & SOLOMON, LLP
275 Madison Avenue, 11th Floor
New York, NY 10016
(212) 661-9400

JOHN HALEBIAN
SAMUEL K. ROSEN*
FREDERICK W. GERKENS, III
WECHSLER HARWOOD
HALEBIAN & FEFFER LLP
488 Madison Avenue
New York, NY 10022
(212) 935-7400

Attorneys for Petitioner

* *Counsel of Record*

171309

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

328pp

QUESTION PRESENTED

Section 11(a) of the Securities Act of 1933 (the "Securities Act") holds an issuer strictly liable for material misstatements or omissions in a registration statement. In contrast, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") requires proof of scienter to sustain a fraud claim. The Private Securities Litigation Reform Act of 1995 (the "PSLRA") reinforced these principles and this distinction by demanding a heightened pleading requirement for allegations made pursuant to the Exchange Act, but not the Securities Act. Rule 23(e) of the Federal Rules of Civil Procedure requires that the interests of class members and class representatives must be aligned in order for a settlement of a class action to be "fair, adequate, and reasonable."

Accordingly, when a plan of allocation makes no distinction between some class members who have demonstrably stronger Section 11 *strict liability claims* and who are *immediately entitled to summary judgment* as compared to other class members who have only Section 10(b) *fraud claims that require proof of scienter, years of discovery, trial and the uncertainties of proportionate liability*, can such a plan be found fair, adequate, and reasonable under Rule 23, particularly when the plan resulted from lead plaintiffs with substantial and demonstrated conflicts of interest that caused specifically identifiable and measurable monetary damage to class members with Section 11 claims?

LIST OF PARTIES

In addition to the parties listed in the caption, the following additional parties are being served as respondents:

Joanne A. Aboff Family Trust, U/A Dated 2/11/92

Betty Duncan

Tere Throenle

Faye Schonbrunn

Ernst & Young

Cendant Corporation

HFS Defendants - James E. Buckman
Leonard S. Coleman
Christel DeHaan
Martin L. Edelman
Scott E. Forbes
Stephen P. Holmes
Robert D. Kunisch
Michael P. Monaco
The Right Hon. Brian Mulroney
Robert E. Nederlander
Robert W. Pittman
E. John Rosenwald, Jr.
Leonard Schultzman
Henry R. Silverman
Robert F. Smith
John D. Snodgrass

CUC Defendants - Bartlett Burnap
T. Barnes Donnelley
Walter A. Forbes
Frederick D. Green
Stephen A. Greyser
Dr. Carole G. Hankin
Christopher K. McLeod
Burton Perfit
Anthony G. Petrello
Robert P. Rittereiser
Stanley M. Rumbough, Jr.
Craig R. Stapleton
Robert Tucker

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The district court's opinion and order (per Walls, D.J.) appointing lead plaintiff (Appendix ("Pet. App.") E, 264a through 286a) is published at 182 F.R.D. 144. The district court's subsequent opinion and order granting the opt-out plaintiffs' motion for partial summary judgment (Pet. App. D, 241a through 263a) are published at 109 F. Supp. 2d 225. The district court's subsequent opinion and orders approving the settlement plan (Pet. App. B, 153a through 236a) and plan of allocation (Pet. App. C, 237a through 240a) are published at 109 F. Supp. 2d 235. The court of appeals' opinion and orders (per Becker, C.J., joined by Sloviter and Ambro, JJ.) affirming in part, and vacating in part, and remanding the settlement plan (Pet. App. A, 1a through 152a) are published at 264 F.3d 201. The court of appeals' order denying *rehearing* and *rehearing en banc* (Pet. App. F, 287a) is not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion on August 28, 2001, and denied rehearing and rehearing en banc on October 4, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23.

STATEMENT OF THE CASE

This Petition affords the Court the opportunity to apply the teachings of *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) – concerning the primacy (especially against expedience) of unconflicted class representation and counsel in resolving complex class litigation – to securities class actions governed

by the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 77z-1; 15 U.S.C. § 78u-4. This case involves the $3.2 billion settlement of the Cendant securities class action litigation, the largest settlement of a securities class action in history (the "Settlement"). Petitioner is challenging the grossly inadequate plan of allocation (the "Plan") spawned by this Settlement. Like the underlying facts in this Court's landmark decision in *Amchem*, the Settlement resulted from a single group of plaintiffs who settled disparate and conflicting claims of all class members. The Plan allocates the settlement proceeds among class members on an equal pro rata basis, regardless of the nature or strength of the claims held by different types of class members. Specifically, the Plan improperly allocates settlement funds equally between *strict liability* claims that provide for *joint and several liability* under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k and *fraud claims that require proof of scienter* and are also subject to defenses based on *proportionate liability* under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b).[1] Contrary to *Amchem*, however, and instead of insisting on the same due process protections and principles of unconflicted representation of divergent interests and claims, and without citing a single authority, the Third Circuit[2] fully retreated from and disregarded the very same protections and principles that it had previously enunciated in *Amchem*, and affirmed the district court's approval of the Plan.

Even more than the substantial theoretical and legal differences between more easily provable and stronger Section 11 strict liability claims and the weaker and more difficult to

1. Although all class members had Section 10(b) fraud claims, a smaller subset of class members also had stronger Section 11 Claims that resulted from their acquisition of Cendant shares through the Merger described in greater detail below. Class members with only Section 10(b) Claims are referred to as Section 10(b) claimants. Class members with both Section 11 *and* Section 10(b) Claims are referred to as Section 11 claimants.

2. The Third Circuit decision below was authored by the same distinguished jurist who authored the *Amchem* decision that was affirmed by this Court.

prove Section 10(b) fraud claims, the factual record of this litigation demonstrates the gross disparity between these claims. For example, the closely-related Cendant PRIDES class action litigation involved legal and factual issues identical to the strict liability Section 11 Claims in the main Cendant action. The action was quickly settled for more than 100 cents on the dollar (even after the payment of attorney's fees) after the lead plaintiff moved for summary judgment on the Section 11 strict liability claims. And as the district court held in approving of the Cendant PRIDES settlement: "The class is completely made whole by such compensation." *In re Cendant Corp. PRIDES Litig.*, 51 F. Supp. 2d 537, 541 (D.N.J. 1999), *aff'd in part, rev'd in part*, 235 F.3d 176 (3d Cir. 2000), *cert. denied*, 122 S. Ct. 202 (2001). Furthermore, in the main Cendant securities class action, class members who opted out early in the proceedings, easily obtained summary judgment against Cendant on Section 11 liability and for the vast majority of their claimed Section 11 damages even as they were denied summary judgment on the Section 10(b) fraud claims with respect to both liability and damages.

In contrast, the original Settlement amount was calculated to return 37 cents per dollar to all class members regardless of the nature and strength of their underlying claims. Whether a class member had a Section 11 strict liability claim or only a Section 10(b) fraud claim made no difference. Petitioner is not objecting to a *de minimus*, theoretical or illusory conflict or misallocation of settlement damages. Lead Plaintiffs' conflict here manifested itself as a concrete misallocation of between hundreds of millions and one billion dollars to Section 10(b) Claims that should have gone to Section 11 Claims. It cannot be reasonably disputed that, as shown in greater detail below, the Section 11 claimants, had they been permitted counsel dedicated exclusively to their claims, would have immediately moved for, and, as in *Yeager v. Cendant Corp.*, Pet. App. 241a-263a, the action brought by the opt-out class members, would

have obtained summary judgment against Cendant on Section 11 liability and on the vast majority of damages.

The Third Circuit evaded the most critical issue of all. It never disputed that if the Section 11 claimants had separate representation from the beginning, they had a clear path to an immediate judgment for liability and for most of their damages on a motion for summary judgment, and in the context of a plan of allocation, a much greater right to a substantially greater portion of the settlement proceeds. Instead, as set forth in greater detail below, the prosecution of the strict liability Section 11 claims was intentionally *deferred* and compromised for the benefit of the 10(b) claimants in order to bolster the more difficult to prove Section 10(b) claims. This improper conduct, expressly admitted by Lead Plaintiffs (defined below) in the Cendant Settlement notice, and further approved of and licensed by the Third Circuit, is the antithesis of how class actions are required to comport with the structural due process requirements of Rule 23 and be prosecuted for the benefit of all class members.

1. ***Background and Nature of the Action.***

This is a consolidated federal securities class action initiated in April 1998 by the filing of numerous shareholder class actions against Cendant and other parties arising from Cendant's admission that its financial books and records materially overstated its revenues and earnings. *In re Cendant Corp. Litig.*, (Pet. App. E, 264a through 286a) (D.N.J. 1998).[3] The claims in

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3. Petitioner Ann Mark filed her own complaint entitled *Ann Mark v. E. Kirk Shelton, et al.*, 98 CV 2004 (WHW) (D.N.J.), on or about April 29, 1998. She brought claims only on behalf of HFS shareholders who exchanged their shares for CUC in connection with the merger that created Cendant. Although she also purchased Cendant shares in the open market, like Lead Plaintiffs, her loss on the open market purchases was significantly less than her loss on the HFS shares. More importantly, unlike Lead Plaintiffs, Ms. Mark never sought to represent simultaneously both former HFS shareholders and Cendant purchasers with Section 10(b) claims.

these actions, relevant to the instant petition, were brought pursuant to Section 11 of the Securities Act, a strict liability claim against the issuer, and Section 10(b) of the Exchange Act, a fraud claim requiring proof of scienter that is subject to various defenses. The Section 11 Claims arose from the merger in December 1997 of CUC International, Inc. ("CUC") and HFS Incorporated ("HFS") to form Cendant Corporation ("Cendant" or the "Company"), wherein the HFS shareholders exchanged their HFS shares for shares of CUC which became Cendant (the "Merger").

In connection with the Merger, CUC and HFS issued a Form S-4 registration statement which included a prospectus. The Section 11 Claims were predicated on misstatements and omissions regarding revenues and earnings contained in the registration statement issued in connection with the Merger. The Section 10(b) Claims arose from open market purchases of CUC shares prior to the Merger and the open market purchase of Cendant shares after the Merger. The Section 10(b) Claims were based on false and misleading statements that caused the market price of Cendant's securities to be artificially inflated, thereby causing members of the class to overpay for those securities during the class period. At the end of the class period, Cendant admitted that its financial records materially overstated its revenues and earnings, thereby causing the price of its securities to substantially decline. These class actions, brought on behalf of purchasers of different types of securities purchased at different times over the three-year class period, often involving disparate circumstances, were consolidated by the district court on or about May 29, 1998.

2. *Potential Intra-Class Conflicts and the District Court's Lead Plaintiff Decision.*

Fifteen motions were filed by individual plaintiffs or plaintiff groups for appointment as lead plaintiff pursuant to the PSLRA. Each movant also sought to have its chosen attorney appointed as lead counsel. The movants essentially fell into one or more of the following categories: (1) former holders of CUC

stock; (2) former holders of HFS stock; (3) purchasers of Cendant stock; and (4) purchasers of Feline Prides ("PRIDES").[4] Several movants expressed concern that the three lead plaintiffs eventually appointed by the district court "would be motivated to 'tilt' the litigation in favor of recovery of the Exchange Act claims because at least one of the lead plaintiff's losses were mostly the result of open market purchases." Pet. App. 271a. Notwithstanding these objections and other alleged conflicts, the district court appointed as "Lead Plaintiffs" over all claimants, with one exception, a unitary group that included the California Public Employees' Retirement System ("CalPERS"), the New York State Common Retirement Fund ("CRF") and the New York City Pension Fund ("NYCPF"). However, because CalPERS had a conflict of interest (relating to its ownership of stock of Merrill Lynch, a PRIDES underwriter) the district court appointed a different lead plaintiff for the PRIDES class. Pet. App. 276a-277a. CalPERS, the CRF and the NYCPF agreed to retain the same counsel and to act jointly in the representation of the class.

The district court justified its decision on the fact that since each member of the group had invested in each of the four types of securities at issue, "the other movants could not rightly challenge the *typicality of its claims*." Pet. App. 270a. [Emphasis added.] The district court further reasoned that the appointed group's presumption of adequacy (because of the larger financial interest of the group over any other movant) was not rebutted because "what matters here is that the claims of every member or constituent group of the putative class arise from the same false or allegedly fraudulent representations of CUC." Pet. App. 272a. The district court then concluded from the foregoing that in pursuit of the large and diverse investments, the group must

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4. The PRIDES were a derivative security based on Cendant common stock. They were issued pursuant to a registration statement virtually identical as to the relevant (and inaccurate) financial statements upon which the Merger shares were issued. The PRIDES offering occurred in February 1998, approximately two months after the Merger in December 1997, and approximately two months prior to Cendant's admission of false financials in April 1998.

be adequate because it "will necessarily seek to establish the elements of every plaintiff's claim." Pet. App. 272a.

On December 14, 1998, Lead Plaintiffs moved the district court for class certification, which was granted on January 27, 1999. No defendant opposed the motion for class certification or the appointment of Lead Plaintiffs as class representative. The class certification order retained the Lead Plaintiffs, as in effect, the sole lead plaintiff with no subclasses created.

3. *The Settlement of the PRIDES Litigation*

As noted, the district court had separated the PRIDES claims from the main Cendant action. The PRIDES Section 11 claims were virtually identical to the Section 11 Claims in the Cendant action since the alleged financial misstatements were virtually identical in the two registration statements. On November 11, 1998, the PRIDES lead plaintiff filed motions for class certification and summary judgment against Cendant under Section 11 of the Securities Act. Before the motions were heard, the parties announced a settlement agreement in which the PRIDES class members were to receive securities worth more than 100 percent of their losses even after the payment of legal fees and expenses.[5] The settlement, which was valued in the total amount of approximately $340 million, was presented to the district court on March 17, 1999 and approved by written decision on June 16, 1999. In approving the settlement, the district court stated, "The Court considers the settlement to be eminently fair and reasonable. The class is completely made whole by such compensation." *In re Cendant Corp. PRIDES Litig.*, 51 F. Supp. 2d at 541.

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5. After the PRIDES settlement was consummated and shortly after the settlement proceeds (i.e., the securities) were issued to class members, the market value of these securities did in fact approximate a 100 per cent recovery of damages.

4. *Settlement of the Main Action and Plan of Allocation*

Meanwhile, Lead Plaintiffs in the main Cendant action agreed with defendants to defer moving for summary judgment on the Section 11 Claims in order to expedite discovery for the Section 10(b) Claims. More than a year after the PRIDES action was settled, Lead Plaintiffs obtained the settlement of all claims against the Cendant defendants and their auditors and a combined settlement fund of $3,186,500,000 was created. The Settlement was preliminarily approved by the district court and a class notice dated April 7, 2000 was issued (the "Class Notice"). The Class Notice included a description of the Plan. The Plan calculated loss amounts per Cendant share, note and option for each day of the class period, based on the amount of artificial inflation caused by CUC and Cendant's issuance of materially false and misleading financial statements. The interests of class members with Section 11 Claims were to be calculated both under the Section 11 damages provision and under Section 10(b), since they possessed both claims, and the class member was to be credited with the larger amount. Class members with Section 11 Claims were given no other credit or benefit.

The Class Notice admitted that: "Prior to formal discovery under the Federal Rules of Civil Procedure, Cendant produced to Lead Plaintiffs (*as part of an agreement for Lead Plaintiffs to defer their motion for partial summary judgment*) over three hundred thousand pages of documents." (Emphasis added.) The motion for partial summary judgment referred to Section 11 Claims, not Section 10(b) Claims. The fact that Lead Plaintiffs admit that they considered pursuing such a motion regarding Section 11 Claims but not Section 10(b) Claims demonstrates that even Lead Plaintiffs understood the Section 11 Claims to be substantially stronger than the Section 10(b) Claims. The statement above further indicates that Lead Plaintiffs willingly negotiated away substantial leverage possessed by Section 11 claimants to bolster the claims of Section 10(b) claimants, an intraclass conflict, and precisely what happened

under similar circumstances in *Amchem*. Furthermore, in paragraph 26(e) of the Class Notice, Lead Plaintiffs argue in favor of the settlement that:

> The risks involved in succeeding at trial against all defendants and collecting from them are substantial. The PSLRA's proportionate liability requirements, under which a defendant may be obligated to pay only for the portion of damages that defendant is held responsible for, may have placed a high proportion of liability on certain individual defendants, who would not have been able to shoulder a substantial amount of damages, and a correspondingly small proportion of liability on Cendant and E&Y.

Although not entirely clear from the Class Notice, the concerns cited above regarding proportionate liability relate *only to Section 10(b) Claims*, not the Section 11 Claims asserted against Cendant. Since they are highlighted as the number one risk factor in favor of the Settlement, they demonstrate a substantial distinction between a Section 11 and Section 10(b) claim that further points out the significant intra-class conflicts that were disregarded by the district court and the Third Circuit.

5. *Petitioner's Objection to the Plan of Allocation*

Petitioner submitted a timely objection to the Plan. She contended that the district court should not approve a Plan that was unfair and inadequate as to Section 11 claimants that resulted from Lead Plaintiffs' substantial and demonstrated conflicts of interest. Her objection further pointed out that the Plan failed to provide class members who had strict liability Section 11 Claims against Cendant (which had no defense to such claims) with any greater portion of the settlement proceeds than class members who had only Section 10(b) fraud claims (which required proof of scienter, were subject to claims of proportionate liability and other defenses). The Plan therefore violated Rule 23 and this Court's landmark decision in *Amchem*.

Because of Lead Plaintiffs' conflicting interests (i.e., representing both Section 11 claimants and Section 10(b) claimants) the Section 11 claimants were grossly under-compensated as compared to the Section 10(b) claimants because the Plan paid all claimants at the same rate. A settlement hearing was held on June 28, 2000 at which the district court considered objections made to various aspects of the Settlement, including the Plan.

6. *The District Court's Decision on the Yeager Plaintiffs' Motion for Summary Judgment*

Long before the district court's consideration of or approval of the proposed settlement and plan of allocation, William P. and Virginia I. Yeager, co-trustees of the William P. Yeager and Virginia I. Yeager Trust (collectively the "Yeager plaintiffs") opted out of the class in the main Cendant action. They moved for partial summary judgment against defendant Cendant for violations of Sections 11 and 12(a)(2) under the Securities Act, 15 U.S.C. §§ 77k, 77*l* and Sections 10(b) and 14(a) under the Exchange Act, 15 U.S.C. § 78n. On August 9, 2000, a week before the district court rendered its decision approving the Settlement and Plan in the main Cendant action, the district court issued its decision and order on the Yeager plaintiffs' motion. *Yeager*, Pet. App. It granted the motion in part and found Cendant liable under Sections 11 and 12(a)(2) of the Securities Act and Section 14(a) of the Exchange Act. The district court also found that there was no issue of material fact as to approximately 75 percent of the damages sought by the Yeager plaintiffs under these provisions. Moreover, the Yeager plaintiffs' Section 11 Claims against Cendant, which were identical to the Section 11 Claims of class members in the main action, were so strong that Cendant actually *conceded liability* entirely and disputed only a small portion of the claimed damages. *Yeager*, Pet. App. 245a-248a.

By contrast, the district court denied summary judgment against Cendant on the Yeager plaintiffs' Section 10(b) claim. It did this for several reasons. First, although certain insider

officers of CUC admitted scienter, that state of mind could not be imputed to Cendant itself without deposition testimony or other direct, concrete proof of the motives of those who authorized and implemented the accounting irregularities. The district court further found that at "this early stage of the litigation," it would be unable to answer even the preliminary question of exactly which CUC or Cendant employees were aware of the fraud. Pet. App. 257a. The district court found that as for the individuals whose "culpable participation" is admitted, no record was developed as to whether the fraud was conducted for their personal benefit or for that of the corporation. "The possibility of adverse interests between the guilty employees and the corporation remains open." *Id.* 233a. Significantly, the district court found that under the PSLRA unlike Section 11, which provides for joint and several liability, Section 10(b) calls for proportionate liability, which can only be determined by a trier of fact.

7. *The District Court's Approval of the Settlement and Plan*

On August 14, 2000, only one week after saying that summary judgment was appropriate for the identical Section 11 claim, the district court approved a "record settlement" agreement reached by Lead Plaintiffs and defendants in the main action. The plan in the Settlement provided that Section 11 claimants and Section 10(b) claimants would receive the same allocation of settlement proceeds, i.e., 37 percent of their damages.[6] In response to Petitioner's objection to the Plan and her related request to represent the HFS shareholders on Section 11 claims only the district court said: (a) the instant settlement and the PRIDES settlements were not comparable because the overall damages in the instant class action were so much greater than the PRIDES settlement and it was in cash as opposed to securities, as in the PRIDES settlement; (b) subclasses were

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6. The district court's approval of the Settlement and Plan was evidenced by various opinions and judgments entered by the district court on August 14 and August 15, 2000 from which Petitioner appealed.

not necessary in the instant action since the district court certified the class for litigation before settlement; and (c) all claims arose from the same "fraudulent scheme."

Notwithstanding, the district court when assessing the "risks of establishing liability" confounded Section 11 liability with that of Section 10(b) and stated the very basis for Petitioner's objections:

> With regard to the Cendant Corporation, in October 1998 [decision on lead plaintiffs' motion to dismiss], the Court wrote: "Basic liability in this case has been conceded by the major corporate defendant." . . . 191 F.R.D. 387 (D.N.J. Oct. 2, 1998). This conclusion stands with regard to Cendant's liability to former HFS shareholders for false and misleading statements in the December 1997 Registration Statement. *See* 15 U.S.C. § 77k . . . .
>
> . . . The risk of establishing basic liability against Cendant is not high, the risk increases, however, when the PSLRA's proportionate liability standard is factored into the equation. [Earlier citing 15 U.S.C. § 78u-4(f)(3)(A).]

Pet. App. 202a.

In addition to the above reasons for rejecting Petitioner's arguments, the district court went on to state:

> Importantly, the members of the *Amchem* and *Ortiz* classes had clear irreconcilable interests. [Citation omitted.] In contrast, CalPERS class members "share common objectives and legal or factual positions." [Citation omitted.] *They all seek the same thing–compensation under the federal securities laws for fraud perpetrated by Cendant and other defendants.* [Emphasis added; citation omitted; second brackets in original.]

Pet. App. 185a-186a.

Nowhere in the district court's Opinion, however, or in the voluminous responses of Lead Plaintiffs opposing Petitioner's objection, is there the slightest analysis of the stark differences between a Section 11 Claim and a Section 10(b) Claim, the entire basis of Petitioner's objection and the most critical element underlying Petitioner's claim that Lead Plaintiffs were conflicted in determining the Plan.

8. *The Court of Appeals Affirmance of the District Court's Approval of the Plan of Allocation*

On August 28, 2001, the Third Circuit issued its opinion and order on the Plan and Settlement, affirming in part, and vacating in part and remanding to the district court. It affirmed the rejection of Petitioner's objections, but on somewhat different grounds than did the district court. Before it turned to Petitioner's argument, in assessing the overall settlement, the Third Circuit took note of the distinction between the joint and several liability provisions of Section 11 of the Securities Act and the proportionate liability scheme called for under the Exchange Act. Further, in summing up the nine factors considered by courts in the Third Circuit as to whether to approve settlements, derived from that court's *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), Pet. App. 33a-35a, the court concluded that the "fourth factor (risk of establishing liability) weighs more heavily against approval of the settlement with Cendant." Pet. App. 59a. This conclusion was reached as a result of the Third Circuit's disagreement with the district court's analysis of the difficulty in proving Cendant's Section 10(b) liability in the *Yeager* case. The Third Circuit found "on the record before it," that joint and several liability under Section 10(b) could readily be established against Cendant for knowingly (instead of a lesser scienter standard) making false and misleading statements. Pet. App. 44a; *see* 15 U.S.C. § 78u-4(f)(2). Even Lead Plaintiffs did not agree with the Third Circuit's assessment of this risk and asserted that the district court had it right in the *Yeager* case. Moreover, even assuming for the sake of argument that the Third Circuit's conclusion was correct, which Petitioner

disputes, obtaining joint and several liability against Cendant would require years of arduous, time consuming and expensive discovery and all of the uncertainties of a jury trial and possible further appeals. None of these factors apply to the Section 11 Claims.

Petitioner argued in her appeal that the Plan was not fair and reasonable to HFS Section 11 claimants, and that Section 11 claimants should receive more of the settlement and be represented by a different lead plaintiff and separate lead counsel chiefly because liability and damages are easier to prove under Section 11 than under Section 10(b): (a) liability is easier to prove under Section 11 as there is no scienter requirement and thus, a less fact intensive inquiry; and (b) there is no proportionate liability under Section 11, while there is under Section 10(b) if the defendant acted recklessly, but without proof of knowledge. Petitioner further argued that Lead Plaintiffs used the stronger Section 11 Claims as leverage to obtain more recovery for the Section 10(b) Claims. Petitioner made this argument because, as the Third Circuit noted, Lead Plaintiffs agreed to defer a motion for partial summary judgment on its Section 11 Claims in return for Cendant's agreement to permit informal discovery on the Section 10(b) Claims.

The Third Circuit also took note of Petitioner's observation that the two related actions, *Yeager* and *PRIDES*, both resulted in higher recoveries for the Section 11 claimants in those actions, and in *Yeager*, partial summary judgment was granted on liability under the Securities Act and proxy claims. As the Third Circuit noted, "Mark's arguments are not without force." Pet. App. 73a. However, it rejected them. First, it disagreed with both Lead Plaintiffs and the district court that it would be difficult to prove joint and several liability under Section 10(b) (i.e., knowing misconduct on behalf of Cendant). Pet. App. 49a-50a. Second, the court implicitly disagreed with the district court again on the ease with which to prove damages under Section 11. Although the court took notice of the *Yeager* partial summary judgment decision, it misapprehended its holding. Although both the district court and

the Third Circuit noted that there likely could be a "battle of the experts" in regard to damage calculations, the Third Circuit ignored the fact that the district court granted summary judgment for the *Yeager* plaintiffs for almost 75 percent of the damages sought by them, an amount conceded by Cendant. Seventy-five percent is still more than the 37 percent provided for under the Plan, prior to the payment of legal fees and expenses.

The Third Circuit also found that because in the aggregate the Section 10(b) damages were greater than the Section 11 damages, this made the Section 10(b) claims "potentially stronger than the Section 11 claims." Pet. App. 75a n.28. Significantly, the Third Circuit concluded that it was unnecessary that "the respective legal strengths of the § 10(b) and § 11 claims involved should have been factored into the fairness of the settlement determination." Pet. App. 75a. The Third Circuit concluded this before it reached Petitioner's arguments concerning the PRIDES settlement. In regard to the latter, the Third Circuit held that the two actions were not comparable because: (a) the PRIDES settlement "involved a paper payout rather than a cash payout (i.e., the plaintiffs got new Cendant stock for their old stock)," Pet. App. 75a-76a; and (b) the PRIDES settlement was a "claims made" settlement with unclaimed settlement funds reverting back to Cendant whereas any claims not made in the instant settlement inures to the benefit of the class, Pet. App. 76a-77a. Thus, the Third Circuit ignored the district court's statement in the PRIDES settlement opinion worth repeating here: "The Court considers the settlement to be eminently fair and reasonable. The class is completely made whole by such compensation." *In re Cendant PRIDES*, 51 F. Supp. 2d at 541.

9. *The Third Circuit Denies Petitioner's Petition for Rehearing En Banc*

On October 4, 2001, the Third Circuit denied Petitioner's timely petition for *rehearing en banc*. This petition for a writ of certiorari followed. Pet. App. 287a.

REASONS FOR GRANTING THE WRIT

The petition should be granted for several reasons. First, the Third Circuit decided an important question of federal law – how a plan of allocation that purports to resolve conflicting claims satisfies the due process requirements of Fed R. Civ. P. 23 – that has not been, but should be settled by this Court. Second, the Third Circuit has decided the question posed above in a way that squarely contradicts this Court's landmark decision in *Amchem*, which affirmed that the due process requirements of Rule 23 protect absent class members from inadequate settlements (here, an unfair and inadequate plan of allocation) resulting from conflicted class representatives. As a practical matter, the Third Circuit ignored the intra-class conflicts between Section 11 claimants and Section 10(b) claimants, and thus, the Settlement and Plan were not in accordance with Fed. R. Civ. P. 23.

This Court should address the type of allocation and conflicts issues that arose here, and which regularly arise in other securities class actions. This litigation presents an unusually plentiful and strong set of facts that sharply demonstrate how an inadequate plan of allocation results from conflicted class representatives, and how an inadequate plan could have easily been prevented at the outset of the litigation or even during its settlement phase. Moreover, the unusual bounty of facts resulting from the multiple related litigations described in detail above that delineate the issues are not likely to arise in another litigation for many years, if at all. And since this area of the law is regularly subjected to scathing criticism and large doses of cynicism regarding the manner in which securities class actions are prosecuted and settled, there is a strong public interest in the resolution of these troubling issues as was similarly done by this Court in *Amchem*. Accordingly, although this Court's denial of a petition for a writ of certiorari is not a finding on the merits, given the circumstances and notoriety of this litigation, such denial is likely to embolden numerous other lead plaintiffs and class representatives to

disregard genuine intra-class conflicts in the prosecution and settlement of securities class actions.

Although allocation issues almost always lurk under the surface of many securities class actions that involve multiple claims with varying burdens and standards of proof, they do not usually erupt into full-blown litigated disputes. If a district court has done its job under Rule 23 of insuring adequate representation of all class members at the outset of the litigation and in certifying the class, than an adequate plan of allocation should usually follow. With the advent of the PSLRA and the lead plaintiff selection process, many courts, particularly the district court below, have over-simplified the process and tended toward naming fewer lead plaintiffs (and eventually class representatives) and their counsel, to the clear detriment of absent class members. While parsing out appropriate subclasses or designing an adequate plan of allocation in a complex securities class action may be fraught with difficult issues, it should not be ignored or trivialized as it was done here and as it is being done with increasing frequency in other securities class actions. *See Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146 (N.D. Cal. 1999). Accordingly, this Court should grant the Petition.

I. THE CENDANT PLAN OF ALLOCATION FAILED TO RECOGNIZE THE VAST DISTINCTIONS BETWEEN SECTION 11 AND SECTION 10(b) CLAIMS THAT CREATED INTRA-CLASS CONFLICTS AND CONSEQUENTLY VIOLATED BOTH THE PROCEDURAL DUE PROCESS REQUIREMENTS OF RULE 23 AND *AMCHEM*

This Court has long recognized the distinctions between a claim brought under Section 10(b) of the Exchange Act and one brought under Section 11 of the Securities Act. *Ernst & Ernst v. Hochfelder* held that a private cause of action for damages under Section 10(b) and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 will not lie in the absence of an allegation of scienter.

425 U.S. 185, 189 (1976). Later, in *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381 (1983), the Court held that although the availability of an express remedy under Section 11 of the Securities Act does not preclude defrauded investors of registered securities from maintaining an action under Section 10(b) of the Exchange Act, "the two provisions involve distinct causes of action and were intended to address different types of wrongdoing."

This Court went on to hold that under Section 11 a plaintiff need only show a material misstatement or omission in a registration statement to establish a prima facie case. Further, such an action can only be brought by a purchaser of a registered security and only against certain parties. In stark contrast, Section 10(b) is a "catchall" antifraud provision. It requires a purchase or sale of a security and proof that the defendant acted with scienter. *Id.* at 382. The Court went on to observe that the basic purpose of the Securities Act is to provide greater protection of registered securities.[7]

As the Court observed, Section 11 "was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who plan a direct role in a registered offering." *Huddleston*, 459 U.S. at 381-82. Pertinent to the case at hand, and in particular, defendant Cendant: "If a plaintiff purchased a security issued pursuant to a registration statement, he need only show a material misstatement or omission to establish his prima facie case. *Liability against the issuer of a security is virtually absolute, even for innocent misstatements.*" 459 U.S. at 382 (emphasis added).

Significantly, the Court observed: "Although limited in scope, Section 11 places a relatively minimal burden on a plaintiff. In contrast, Section 10(b) is a 'catchall' antifraud provision, but it requires a plaintiff to carry a heavier burden to

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7. *See also Huddleston*, 459 U.S. at 382 n.12 ("See H.R. Rep. No. 85, 73d Cong., 1st Sess. 9 (1933) (Section 11 creates 'correspondingly heavier legal liability' in line with responsibility to the public.")).

establish a cause of action." *Id.* (Footnote omitted) Furthermore, this Court found "that the [Securities Exchange] Act and the [Securities] Act [may] 'prohibit some of the same conduct.' " *Huddleston*, 459 U.S. at 383 (quoting *United States v. Naftalin*, 441 U.S. 768, 778 (1979)). Finally, this Court recognized that there are usually a greater number of defendants in a Section 10(b) action than a Section 11 action. *Huddleston*, 459 U.S. at 382 n.13 ("A Section 11 action can be brought only against the issuer, its directors or partners, underwriters, and accountants who are named as having prepared or certified the registration statement. *See* 15 U.S.C. § 77k(a).").

The PSLRA reaffirmed the distinctions between Section 11 claims and Section 10(b) claims and added a few of its own. Outside of certain amendments regarding the selection of lead plaintiffs, the PSLRA made virtually no changes to Section 11. In contrast, Congress imposed greater burdens on plaintiffs to plead and prove a Section 10(b) Claim, and eliminated joint and several liability under the Exchange Act absent proof that the defendants acted "knowingly."

Significantly, the PSLRA imposed a heightened pleading requirement for those bringing actions under Section 10(b). *See* 15 U.S.C. § 78u-4(b). No such provision was added to Section 11. All Circuits to have addressed the issue to date, including the Third, have interpreted the PSLRA to have raised the bar on pleading a Section 10(b) action. *E.g.*, *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534 (3d Cir. 1999) ("In many jurisdictions, adoption of a 'strong inference' standard will substantively heighten the barriers to pleading scienter, a result Congress intended.").

In addition, Congress added Section 201 to the Exchange Act to provide for "proportionate liability" or comparative fault. Under that Section, Congress added several provisions for determination of responsibility by the jury. For example, special jury instructions and interrogatories are to be used at trial, going to: (1) whether the defendant violated the securities laws;

(2) the percentage of responsibility of the defendant "measured as a percentage of the total fault of all persons who caused or contributed to the loss incurred by the plaintiff"; and (3) whether the defendant "knowingly" (as opposed to recklessly) committed a violation of the securities laws. 15 U.S.C. § 78u-4(f)(3). In addition, the PSLRA calls for "special interrogatories or findings" to determine the preceding issues and "factors for consideration" in determining the percentage of responsibility under the proportionate liability provisions. 15 U.S.C. § 78u-4(f)(3)(B),(C). These include: "(i) the nature of the conduct of each covered person found to have caused or contributed to the loss incurred by the plaintiff or plaintiffs, and (ii) the nature and extent of the causal relationship between the conduct of each such person and the damages incurred by the plaintiff or plaintiffs." 15 U.S.C. § 78u-4(f)(3)(C).[8]

Finally, the PSLRA makes a distinction for damage calculations between Section 11 and Section 10(b) claimants adding Section 21D(e) to the Exchange Act entitled "Limitation on damages," 15 U.S.C. § 78u-4(e), but doing nothing similar to the Securities Act. In general, Section 21D(e) limits damages to the difference between the purchase price of the security and the greater of the 90-day mean trading price following the close of the class period or the actual sale price, if the plaintiff sells the security during these 90 days. Under the Securities Act, plaintiffs are entitled to rescission damages, *Randall v. Loftsgaarden*, 478 U.S. 647, 650 (1986), or the difference between the price actually paid for the security in the offering and the price at date of the filing of the complaint. 15 U.S.C. § 77k(e).

The point is that "[i]n significant respects, the interests of those [with Section 11 claims and those with only Section 10(b)

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8. Section 201 applies to Section 11 cases in limited circumstances. It applies to outside directors who sign the registration statement. 15 U.S.C. § 77k(f)(2)(A). The issuer remains jointly and severally strictly liable.

claims] are not aligned," *Amchem*, 521 U.S. at 626, because there are issues as to both liability and damages that vary and conflict between the two and that, in this case, existed but were ignored by Lead Plaintiffs and their counsel and by both the district court and the Third Circuit.

Other courts (some before the PSLRA) have, by contrast, recognized the intra-class conflicts that arise from bringing Exchange Act and Securities Act claims related to the same action, and provide for separate lead plaintiffs for Section 10(b) and Section 11 claims, reasoning that "[t]hese two causes of actions (though they may arise from a common nucleus of operative facts) are distinct in terms of legal theory and requirements of proof. They differ as to the identity of those persons who, in each case, can prove a viable claim, " *Unicorn Field, Inc. v. The Cannon Group, Inc.*, 60 F.R.D. 217, 226-27 (S.D.N.Y. 1973) (quoting *Weiss v. Tenney Corp.*, 47 F.R.D. 283, 287 (S.D.N.Y. 1969). That court also noted, as previously discussed, that "the burden of proof in a § 11 action is far less onerous. With certain exceptions, plaintiff need only demonstrate that the registration statement and prospectus were materially false and misleading and need not prove fraudulent intent on the part of the issuer." *Unicorn Field*, 60 F.R.D. at 227.

In addition, the court noted that under Section 11 "reliance is conclusively presumed." *Id.* Although the court noted that it is not necessary to prove reliance in a fraud on the market case, the court did observe that a Section 10(b) claimant must still demonstrate "some causal nexus between the deception and the injury." *Id.* (citing, *inter alia*, *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972). *See also Rothman v. Gregor*, 220 F.3d 81, 95 (2d Cir. 2000) ("To establish [loss] causation [in a Section 10(b) action], a plaintiff must prove 'that the economic harm that it suffered occurred as a result of the alleged misrepresentations' and that 'the damage suffered was a foreseeable consequence of the misrepresentations' [Citation omitted.]"); *Wolfson v. Solomon*, 54 F.R.D. 584 , 588 (S.D.N.Y.

1972) (separate subclasses designated for Section 11 and Section 10(b) claimants); *In re Select Comfort Corp. Sec. Litig.*, 202 F.R.D. 598, 603 (D. Minn. 2001) (to counter "any problems arising from the differing burdens of proof or legal standards of the varying [Securities Act and Exchange Act] claims . . . a single class consisting of two subclasses may be properly certified in this action."); *In re Western Union Sec. Litig.*, 120 F.R.D. 629, 632 (D.N.J. 1988) (two Securities Act subclasses with same representatives; and separate subclass with different representative for Exchange Act claims); *Cf. Freedman v. Value Health, Inc.*, 190 F.R.D. 33, 37 (D. Conn. 1999) (appointing several co-lead plaintiffs and counsel, and requesting briefing on the use of subclasses for Section 11 claimants and Section 10(b) claimants, citing Fed. R. Civ. P. 23(c)(4)); *Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d at 1151 n.4 (appointing one lead plaintiff for both Securities Act and Exchange Act claims, but acknowledging that its ruling would not prevent forming subclasses at the certification stage); *Brennan v. Midwestern United Life Ins. Co.*, 259 F. Supp. 673 (S.D. Ind. 1966) (same).

II. THE THIRD CIRCUIT IGNORED THE INTRA-CLASS CONFLICTS BELOW THAT REQUIRED THE PLAN OF ALLOCATION TO PROVIDE SIGNIFICANTLY GREATER COMPENSATION TO SECTION 11 CLAIMANTS THAN TO SECTION 10(b) CLAIMANTS

A. *The Standards For Determination Of Subclasses Under Rule 23*

Although subclasses and separate representation are not necessary in all securities class actions with both Section 11 and Section 10(b) claimants, the inadequate and unfair plan of allocation that resulted from the Settlement demonstrates that subclasses were necessary here.

Rule 23(c)(4) authorizes the court to (a) allow a class action to be maintained with respect to particular issues, or (b) to divide

the class into appropriate subclasses. "Rule 23(c)(4) imposes a duty on the court and gives it ample power to 'treat common things in common and to distinguish the distinguishable.' " 7B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1790 (2d ed. 2001 Supp.) (quoting *Jenkins v. United Gas Corp.*, 400 F.2d 28, 35 (5th Cir. 1968)). "The usual situation in which a court will divide a class into subclasses under Rule 23(c)(4)(B) is when the class is found to have members whose interests are divergent or antagonistic." Wright & Miller, *supra*. Finally, as the same authority observed, Rule 23(c)(4)(B) "has allowed greater flexibility in maintaining a class action under the federal securities laws." *Id.*, citing *Unicorn Field*, 60 F.R.D. at 227, for the proposition that "[c]auses of action for the violation of Section 11 of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 were sufficiently distinct to make the designation of the two subclasses appropriate." Even though there was overlapping of claims, subclasses were appropriate.

> [N]amely, a subclass consisting of all who were original purchasers of shares of stock offered pursuant to the February 15 registration statement, as well as those who purchased such shares between that date and the date suit was brought, and a Section 10(b) class consisting of those who purchased stock during the relevant period and suffered losses as a result of misstatements or omissions in the prospectus.

Wright & Miller, § 1790 n.23, citing *Unicorn Field* and collecting cases.

Further, this Court held that a class containing members with adverse interests could not satisfy Rule 23(a)(4)'s adequate-representation requirement without separately represented subclasses. *Amchem*, 521 U.S. at 608. As the Court noted, under Rule 23(a)(4), representative parties must "fairly and adequately protect the interests of the class," a requirement that "serves to

uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 594. To comply with this provision, the representative plaintiff "must be part of the class and possess the same interest and suffer the same injury as the class members." *Georgine v. Amchem Prod., Inc.*, 83 F.3d 610, 630 (3d Cir. 1996), *aff'd sub. nom., Amchem*, 521 U.S. 591 (1997). In *Amchem*, the Third Circuit found that the class lacked adequate representation because there were no subclasses even though the class "included a fairly representative mix of futures and injured plaintiffs." *Georgine*, 83 F.3d at 632; *see Amchem*, 521 U.S. at 595 (the proposed settlement contained "no structural assurance of fair and adequate representation for the diverse groups and individuals affected").

Simply because members of a "unitary class" may have overlapping common issues,

> where differences among members of a class are such that subclasses must be established, [there is] no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups.

In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721, 742-43 (2d Cir. 1992). Even Third Circuit precedent calls for subclassing in circumstances such as this one. *See, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 800-01 (3d Cir. 1995) (the class failed the adequacy-of-representation requirement because it contained subgroups with antagonistic interests; as a result, the settlement failed to protect the interests of all class members). Thus, courts generally view the formation of subclasses as necessary to the certification of classes with uncommon issues.[9]

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9. Here, petitioner did precisely what the Third Circuit called for in other cases. She sought to have the subclass of Section 11 claimants represented by separate counsel on the plan of allocation aspect of the

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B. *For Practical Purposes The Class Was Not Certified For Litigation, But For Settlement*

The Third Circuit in the instant matter either rewrote or ignored the record before it primarily for the same reasons as did the district court in *Amchem* – expediency. Observing that Petitioner's objections were "weighty" and that the "question of the fairness of the settlement [ ] factors is closer than District Court made it out to be," the Third Circuit nonetheless rejected Petitioner's arguments. Pet. App. 4a. Further, it is of no moment that the class was certified before settlement. Here, on December 19, 1999, Lead Plaintiffs filed a motion for class certification with no separate lead plaintiff and counsel appointed for the Section 11 claimants. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857 (1999) ("In *Amchem*, we concentrated on the adequacy of named plaintiffs, but we recognized that the adequacy of representation enquiry is also concerned with the 'competency and conflicts of class counsel. *Id.*, 521 U.S. at 626, n. 20 . . .' ").

The motion for class certification was *unopposed* by defendants and granted by the district court within approximately 30 days of its filing.[10] No class discovery was taken. In addition, hardly any formal discovery of defendants (other than document discovery) was taken by Lead Plaintiffs. Pet. App. 43a. (certain objectors "argue that there was insufficient discovery. In particular, they point to the fact that no depositions were taken . . . [T]he early stage of the discovery means that Settlement was not negotiated 'under a real and credible threat of litigation,' " (citation to brief omitted)). Thus, the circumstances of the settlement was more akin to that of a settlement class than a class certified for litigation purposes.

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settlement. *See Link v. Mercedes Benz of N. Am., Inc.*, 788 F.2d 918, 930 (3d Cir. 1986) ("If the class representatives did not adequately represent the subclass, the proper remedy was to amend the class certification order or to permit additional plaintiffs to intervene.").

10. Defendant Ernst & Young LLP filed an objection to class certification, which was withdrawn shortly thereafter.

See Amchem, 521 U.S. at 622 (federal courts lack authority to substitute for Rule 23's certification criteria a standard that if a settlement is "fair" then certification is proper).

C. *The Third Circuit Disregarded The District Court's Findings On The Differences Between Section 11 and 10(b) Liability And Damages*

Other objectors as well as Petitioner argued that the risk of establishing liability with Cendant increases when the PSLRA's proportionate liability provisions are factored into the equation. This was essentially why the district court denied summary judgment to the Yeager plaintiffs. Pet. App. 257a-258a ("a reasonable trier of fact could conclude that the true motive of the wrongdoers was the preservation of their employment, salaries, emoluments, and reputations, as well as their liberty, at the expense of the corporation's well-being." *quoting In re Phar-Mor, Inc. Sec. Litig.*, 900 F. Supp 784, 787 (W.D. Pa. 1995)). At the same time, the Third Circuit recognized that "if Cendant were to lose on the § 11 claims at trial, it would be jointly and severally liable on those claims. *See* 15 U.S.C. § 77k(f)." Pet. App. 47a.

However, the Third Circuit made an end run around both the proportionate liability sections of the PSLRA and the district court's holding in the *Yeager* case by relying on pre-PSLRA precedent to find that there would be no "significant risk of establishing joint and several liability against Cendant in this case [under Section 10(b)]." Pet. App. 49a (citing *Rochez Bros., Inc. v. Rhoades*, 527 F.2d 880, 884 (3d Cir. 1975) (stating in *dicta* that "There is no doubt that the fraud of an officer of a corporation is imputed to the corporation when the officer's fraudulent conduct was (1) in the course of his employment, and (2) for the benefit of the corporation")).

The district court, relying on both the proportionate liability provisions of the PSLRA and post-PSLRA case law and considering *Rochez* and defendant Cendant's arguments, conceded that: "without deposition testimony or 'other direct,

concrete proof" of the motives of those who authorized and implemented the accounting irregularities, a ruling that the knowledge of former employees can be imputed to the corporation would be premature." Pet. App. 256a-257a. As the district court noted: "[t]he possibility of adverse interests between guilty employees and the corporation remains open." *Id.*[11]

Significantly, the district court, unlike the Third Circuit, did consider the amendments to the Exchange Act since *Rochez Brothers* was decided.

> That said, it is also noted that the [PSLRA] requires the fact finder to ultimately determine the percentage of responsibility of each person putatively involved, "measured as the percentage of total fault of all persons who caused or contributed to the loss incurred by plaintiff," and "[w]hether such person knowingly committed a violation of the securities laws." 15 U.S.C. § 78u-4(f)(3)(A)(ii)-(iii). Plaintiffs' motion for summary judgment on their Section 10(b) and Rule 10b-5 claims is denied without prejudice.

Pet. App. 259a.

In contrast, the Third Circuit's unsupported conclusion assessing joint and several liability against the corporate defendant for knowingly violating Section 10(b) is devoid of any consideration of the implications of the proportionate liability section of the PSLRA. Indeed, this begs the question whether *Rochez* is still good law after the passage of the PSLRA for the proposition for which the Third Circuit panel relied upon it here.

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11. The district court also relied upon *In re Kidder Peabody Sec. Litig.*, 10 F. Supp. 2d 398, 415-17 n.17 (S.D.N.Y. 1998) (for the proposition that "finding evidence to support a reasonable inference of corporation's scienter where a securities analyst had openly reported hundreds of millions of dollars in false profits, but not deciding imputation issue because of dispute as to whether trader was acting adversely to corporation's interest").

Not only did defendants and the district court believe that establishing a knowing violation of Section 10(b) was a substantial litigation risk, so did Lead Plaintiffs. Pet. App. 49a (in countering another objector's argument that the establishment of knowing conduct on the part of Cendant would be easy to demonstrate, Lead Plaintiff, also relying on *Rochez*, found the district court's reasoning persuasive).

Next, the Third Circuit rejected the record below when it found that "the real difficulty in the trial of this case would have been establishing damages, a process which both Section 10(b) and 11 claimants would have to undergo equally and which almost certainly would devolve into a 'battle of the experts.' " Pet. App. 50a-51a. However, the Third Circuit completely ignored the fact that the district court on summary judgment awarded approximately 75 percent of the damages alleged by the Yeager Plaintiffs under their Section 11 claims, while denying summary judgment to the plaintiffs on Section 10(b). Moreover, the Third Circuit stated erroneously, "[i]n fact, in *Yeager*, the district court denied Yeager summary judgment on his § 11 claim in part because the court found that there was a genuine issue of material fact as to the amount of Yeager's § 11 damages." Pet. App. 74a. This is simply incorrect. The district court did not deny summary judgment to the Yeagers on Section 11 damages. It simply limited their damages to approximately 75% of the alleged amount that was undisputed by Cendant. Pet. App. 261a.

Finally, the Third Circuit concluded that because the Section "10(b) damages available" were greater than the available Section "11 damages," "in this respect the § 10(b) claims are potentially stronger than the § 11 claims." Pet. App. 75a. It appears that the Third Circuit is finding that because the overall settlement was large because of the potential Section 10(b) damages, it must be fair. But this measure of fairness in regard to settlements was expressly rejected by this Court in *Amchem*, 521 U.S. at 621 ("If a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and

permitting designation despite the impossibility of litigation, both class counsel and court would be disarmed.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN HALEBIAN
SAMUEL K. ROSEN*
FREDERICK W. GERKENS, III
WECHSLER HARWOOD
HALEBIAN & FEFFER LLP
488 Madison Avenue
New York, NY 10022
(212) 935-7400

KENNETH A. ELAN
LAW OFFICES OF KENNETH A. ELAN
217 Broadway - Suite 606
New York, NY 10007
(212) 619-0261

JOSEPH P. GARLAND
KLEIN & SOLOMON, LLP
275 Madison Avenue, 11th Floor
New York, NY 10016
(212) 661-9400

Attorneys for Petitioner

* *Counsel of Record*